IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 58

ALBERT H. GRISHAM,

Petitioner,

vs.

CHARLES R. HAGAN, Warden,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

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Opinions Below

The opinion of the Court of Appeals was filed November 20, 1958, and is reported at 261 F. 2d, 204.

The opinion of the United States District Court for the Middle District of Pennsylvania was filed April 22, 1958, and is reported at 161 F. Supp. 112.

The petition for certiorari was filed February 16, 1959, and certiorari was granted April 27, 1959 (79 S.Ct. 900).

Jurisdiction

The opinion and judgment of the Court of Appeals for the Third Circuit in this case is in conflict with the decision

of the Court of Appeals for the District of Columbia in the case of the *United States ex rel. Guagliardo* v. *McElroy*, 259 F. 2d 927 (D.C. Cir. 1958) and with the decision of this Court in the case of *Reid* v. *Covert*, 354 U.S. 1; 77 S.Ct. 1222 (1957).

(i) The date of judgment sought to be reviewed is November 20, 1958.

(ii) The statutory provision giving this Court jurisdiction to review the judgment or decree in question by writ of certiorari is 28 U.S.C. 1254 (1).

Statute and Constitutional Provisions

This case involves the Constitutionality of Art. 2 (11) of the Uniform Code of Military Justice, 10 U.S.C. 802 (11) (Supp. V 1958), which reads as follows:

> "The following persons are subject to this code:
>
> > "(11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States . . . "

Petitioner contends that this statute violates the following Constitutional provisions:

Art. III, Sec. 2, cl. 3, which states:

> "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."

The Fifth Amendment, which declares:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger: . . ."

And the Sixth Amendment, which provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ."

The following Constitutional provisions are relevant:

> Art. I, Sec. 8, cl. 14: "The Congress shall have power . . . to make Rules for the Government and Regulation of the land and naval Forces."
>
> Art. I, Sec. 8, cl. 18: "The Congress shall have power . . . to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Question Presented

Whether the Constitution permits the trial in a foreign country of a civilian employee of the Army by Military Court-Martial for a capital offense in time of peace?

Statement of the Case

Petitioner, then a citizen of the United States (R. 2, 9), and a civilian employee of the Army in France (R. 6), was charged with premeditated murder in violation of

Art. 118, Uniform Code of Military Justice (10 U.S.C. 918) (R. 6). Petitioner was convicted by a General Court-Martial held in France between March 20 and March 27, 1953 (R. 6, 9) of unpremeditated murder (R. 6), and was sentenced to be confined at hard labor for the term of his natural life (R. 7), a sentence subsequently reduced to thirty-five (35) years by clemency action (R. 3, 9). While serving his sentence at the United States Penitentiary at Lewisburg, Pennsylvania, he filed a petition for writ of habeas corpus and obtained a rule to show cause why it should not be allowed (R. 6). After hearing, the rule was dismissed and the petition denied (R. 21).

An appeal was taken to the United States Court of Appeals for the Third Circuit. The appeal was docketed to No. 12,630, and was argued on October 24, 1958 before Goodrich, McLaughlin and Kalodner, Circuit Judges. On November 20, 1958, an opinion was filed by Goodrich, Circuit Judge, affirming the judgment of the District Court (R. 22).

The return and answer of respondent admits that the petitioner, a civilian, is presently imprisoned at the U.S. Penitentiary, Lewisburg, Pa., under a sentence of a General Court-Martial, held under the purported authority of Art. 2 (11) of the Uniform Code of Military Justice, 10 U.S.C. 802 (R. 6).

The return and answer thus places in issue the basic question of the Constitutionality of Art. 2 (11) as applied to this petitioner under the facts of this case.

The petitioner is an accountant, and was employed as a civilian employee of the Department of the Army, assigned to the District Engineers, Nashville, Tennessee, with civilian Civil Service status. In September of 1952, petitioner was temporarily assigned to the Orleans District En-

gineers, Orleans, France (R. 11, 12). Shortly after petitioner's arrival in France, he was joined by his wife, Dolly D. Grisham, and on December 7, 1952, petitioner and his wife were residing at 74 Blvd. Alexandre Martin, Orleans, France, in an apartment rented from a French civilian (R. 12). Petitioner was furnishing food, medical care, and transportation for himself and his wife (R. 13).

During the early evening hours of December 6, 1952, petitioner and his wife attended a cocktail party and, according to the uncontradicted testimony, petitioner and his wife became intoxicated (R. 16).

About 2:30 A.M. on December 7, 1952, the petitioner notified both American military authorities and French civilian authorities of the death of his wife. After questioning by the French civilian authorities, he was arrested by them and charged with murder of his wife (Record of Trial).

Before the petitioner could be brought to trial by the French, the United States Military requested the Justice Department of the French Republic to surrender jurisdiction to the American military authorities. The French complied with this request and petitioner was subsequently tried by a General Court-Martial on a charge of premeditated murder in violation of Art. 118, Uniform Code of Military Justice, 10 U.S.C. 918. Prior to the plea on the general issue, the petitioner moved to dismiss the charge on the ground that the Court-Martial lacked jurisdiction to try the petitioner and the offense charged. This motion was predicated on petitioner's contention that jurisdiction over the person and the offense remained with France (R. 7). (See also p. 22, *et seq.* of Record of Trial, Exhibit A.) Petitioner was found guilty of the lesser and included offense of unpremeditated murder.

The alleged authority for the jurisdiction of the General Court-Martial which tried petitioner is Art. 2 (11) of the Uniform Code of Military Justice, 10 U.S.C. 802, which provides:

"The following persons are subject to this code:

"(11) Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons serving with, employed by, or accompanying the armed forces outside the continental limits of the United States . . ."

The sole question presented in this proceeding is the Constitutionality of this statute as applied to petitioner.

Summary of Argument

It is the position of the petitioner:

That the United States of America was created by the people, who ordained and fixed its powers and limitations in the Constitution. All powers of the United States—civil and military—within and without the geographical limits of the country, are based upon, derived from, and limited by the Constitution. Congress cannot deprive a citizen of his basic rights under the Constitution. A jury trial in an Article III court is a basic right in time of peace—of all citizens charged with a capital crime—who are not members of the Armed Forces. Thus, any law that undertakes to subject such a citizen, charged with such a crime in time of peace to trial by Court-Martial anywhere in the world is unconstitutional, null and void; and any judgment resulting from such trial is likewise unconstitutional, null and void.

That the provisions of Art. 2 (11) U.C.M.J., having been held unconstitutional as applied to capital cases involving civilian dependents accompanying the Armed Forces, cannot be separated into constitutional and unconstitutional fragments, and consequently stand invalid in their entirety.

Assuming *arguendo* that this Court decides that Art. 2 (11) is severable:

That petitioner is a civilian, and not a member of the Armed Forces.

That in time of peace the trial of a civilian for a capital crime by military Court-Martial is unconstitutional as a violation of Art. III, and the Fifth and Sixth Amendments.

That, in the alternative, if the Constitutional rights guaranteed petitioner are not absolute, but are to be balanced against the power and necessity for Congress to regulate the military, then the scales should be weighed heavily in favor of this petitioner. Grisham was not living on a military base—was not engaged in any essential military activity—and was charged with a capital offense.

That the method of trial alone is at issue in this case. Congress has the power to establish courts, which would give civilians working overseas with the military the protection of the Constitution, and which would meet all necessary and proper requirements for the government of the military forces.

ARGUMENT

I

When This Court in Reid v. Covert, 354 U.S. 1; 77 S.Ct. 1222 (1957) Held Unconstitutional That Part of Article 2 (11) U.C.M.J. Which Related to Capital Cases Involving Civilian Dependents Accompanying the Armed Forces Overseas, It Struck Down Article 2 (11) in Its Entirety.

In the case of *United States ex rel. Guagliardo* v. *McElroy* (259 F. 2d 927, D.C. Cir. 1958), the majority of the Court of Appeals for the District of Columbia held that Art. 2 (11) of the Uniform Code of Military Justice, having been held unconstitutional as applied to capital cases involving civilian dependents accompanying the Armed Forces, cannot be separated into constitutional and unconstitutional fragments, and consequently is invalid when applied to any civilians serving with, or employed by the Armed Forces overseas.

> "The Supreme Court has repeatedly referred to the 'wisdom of refraining from avoidable Constitutional pronouncements.' *United States* v. *International Auto. Workers*, 352 U.S. 567, 590. This settled principle leads us to decide this case on the ground of non-severability. Should we hold severable the application of the statute to appellant for the crime here charged, and go on to decide whether his conviction by court-martial was Constitutional, obviously we would be deciding an important Constitutional question. This course is not required and, therefore, should not be pursued in the circumstances of this case. The relevant precedents call for a decision on the basis spelled out in the *Reese* and kindred cases. Under those decisions we hold that subparagraph (11), which the

Supreme Court has held is invalid as presently enacted, *Reid* v. *Covert*, is nonseverable into fragments which have not been specified by Congress or as to which Congress has not furnished criteria for a case-by-case judicial application. At least the application of the subparagraph to such a civilian as appellant, charged with such an offense as is here involved, cannot be validly carved out of the invalid general spread of that provision" (*United States ex rel. Guagliardo* v. *McElroy*, 932).

The Court of Appeals for the Third Circuit in the *Grisham* case refused to follow the reasoning of the majority opinion in the *Guagliardo* case, stating as follows (R. 23):

"In the *Guagliardo* case the petitioner was a civil service employee of the Air Force. The crime with which he was charged was not a capital crime but larceny. The District of Columbia Circuit Court said that it was not going to decide any Constitutional question: that since the Supreme Court has said the section of the Military Justice Code when applied to persons who 'accompany the armed forces' was unconstitutional the whole clause fell.

"With due deference to a very competent court, we cannot join in this ground for granting a habeas corpus writ. The statute in question expressly contains a reservation clause providing:

"'If a part of this Act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this Act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications. Pub. L. No. 1028, 84th Cong., 2d Sess., 70 A STAT. 640 (Aug. 10, 1956).'

"We think this provision controls, and that we must look to see whether a difference may not exist as to persons 'serving with' or 'employed by' from those 'accompanying' the armed forces."

This Court has granted a certiorari in the *Guagliardo* case (79 S.Ct. 580), and if the reasoning of the majority opinion in that case is approved, then the Third Circuit must be reversed in the *Grisham* case. Assuming *arguendo*, however, that this Court rejects the reasoning of the majority in the *Guagliardo* case and decides that Art. 2 (11) U.C.M.J. is severable, the Constitutionality of that section as applied to the *Grisham* case must be considered.

II

The Trial of a Civilian Citizen for Any "Capital or Otherwise Infamous" Crime in Time of Peace by Military Court-Martial Is Unconstitutional.

The petitioner contends that Article 2 (11) Uniform Code of Military Justice, as applied to the facts of his case, is a violation of the following Constitutional provisions:

Art. III, Sec. 2, cl. 3, which states:

"The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."

The Fifth Amendment, which declares:

"No person shall be held to answer for a *capital*, or otherwise infamous *crime*, unless on a presentment or

> indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service *in time of War* or public danger: . . ." (Emphasis supplied.)

And the Sixth Amendment, which provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ."

This contention is strongly supported by the decision of this Court in the consolidated cases of *Reid* v. *Covert* and *Kinsella* v. *Krueger*, decided June 10, 1957, 354 U.S. 1, 77 S.Ct. 1222 (1957).

In the *Covert* case, during March 1953, Clarice Covert killed her husband, a sergeant in the United States Air Force, at an air base in England, in peace time. Mrs. Covert was residing on the base with her husband. She was tried by a Court-Martial for murder under Art. 118, U.C.M.J., a capital case. The Court-Martial asserted jurisdiction under Art. 2 (11) U.C.M.J.

In the *Krueger* case, during October 1952, Mrs. Dorothy Smith killed her husband, an Army officer, at an Army post in Japan, where she was living with him in peace time. She was tried for murder by a Court-Martial, found guilty, and sentenced to life imprisonment. In this case also, the military authorities asserted jurisdiction under Art. 2 (11) U.C.M.J.

In an opinion covering the consolidated cases, hereinafter referred to as the *Covert* case, written by Mr. Justice Black, in which Chief Justice Warren, Mr. Justice Douglas, and Mr. Justice Brennan joined, the Supreme Court held that the provisions of Art. 2 (11) U.C.M.J., 10 U.S.C. 802,

were unconstitutional as applied to the trials of Mrs. Covert and Mrs. Smith. Mr. Justice Frankfurter and Mr. Justice Harlan wrote separate opinions in which they concurred with the result, but limited their conclusion to capital cases involving civilian dependents of members of the Armed Forces. Mr. Justice Clark wrote a dissenting opinion in which Mr. Justice Burton joined.

Mr. Justice Black's opinion leaves no room for doubt that the military may not deprive civilians of their Constitutional guarantees by trying them by Courts-Martial in time of peace. It would serve no useful purpose to quote all of the statements in the opinion which support this conclusion. A few are sufficient:

> "In the light of these (the Constitutional provisions quoted in this brief) as well as other Constitutional provisions, and the historical background in which they were formed, military trial of civilians is inconsistent with both the 'letter and spirit of the Constitution'" (354 U.S. 22; 77 S.Ct. 1233).
>
> "In light of this history, it seems clear that the Founders had no intention to permit the trial of civilians in military courts, where they would be denied jury trials and other Constitutional protections, merely by giving Congress the power to make rules which were 'necessary and proper' for the regulation of the 'land and naval Forces.' Such a latitudinarian interpretation of these clauses would be at war with the well-established purpose of the Founders to keep the military strictly within its proper sphere, subordinate to civil authority. The Constitution does not say that Congress can regulate 'the land and naval Forces and all other persons whose regulation might have some relationship to maintenance of the land and naval Forces.' There is no indication that the Founders con-

templated setting up a rival system of military courts to compete with civilian courts for jurisdiction over civilians who might have some contact or relationship with the Armed Forces. Courts-Martial were not to have concurrent jurisdiction with courts of law over non-military America" (354 U.S. 30; 77 S.Ct. 1237).

". . . While we recognize that the 'war powers' of the Congress and the Executive are broad, we reject the Government's argument that present threats to peace permit military trial of civilians accompanying the armed forces overseas in an area where no actual hostilities are under way. The exigencies which have required military rule on the battlefront are not present in areas where no conflict exists. Military trial of civilians 'in the field' is an extraordinary jurisdiction and it should not be expanded at the expense of the Bill of Rights. We agree with Colonel Winthrop, an expert on military jurisdiction, who declared: *'a statute cannot be framed by which a civilian can lawfully be made amenable to the military jurisdiction in time of peace.'*" (Emphasis not supplied.) (354 U.S. 34, 35; 77 S.Ct. 1240.)

Insofar as these statements go beyond the position necessary to cover the particular facts before the Court in the *Covert* case, they must, of course, be classified as dicta. Nevertheless, it is fair to infer from these strong dicta that the trial of any civilian, for any serious crime in time of peace by a Military Court-Martial, is unconstitutional. Justices Harlan and Frankfurter are more restrained and limit their opinions to the specific facts before the Court, viz., civilian dependents of military personnel charged with capital offenses. As pointed out by Justice Frankfurter in his opinion, this does not mean that the rule of the *Covert* case would not be applied to capital cases involving civilians other than dependents:

"I repeat, I do not mean to imply that the considerations that are controlling in capital cases involving civilian dependents are constitutionally irrelevant in capital cases involving civilians other than dependents or in non-capital cases involving dependents or other civilians. I do say that we are dealing here only with capital cases and civilian dependents" (354 U.S. 46; 77 S.Ct. 1246).

The Court below seems to accept the theory of the Black opinion but concludes that Grisham was in the armed services for the "purposes of Clause 14 even though he had not formally been inducted and did not wear a uniform" (R. 26). Four grounds are given for this conclusion: (1) That long-established practice has treated civilians accompanying the armed services overseas as subject to discipline by military authorities; (2) That civilian employees are essential to the Army, dependents are not; (3) That civilian employees associate with the military overseas through their own volition; and (4) That civilian employees have many of the privileges of service men. These grounds will be considered in the order stated.

(1) Counsel for petitioner have been unable to find any authority, long-established or otherwise, for permitting the trial in a foreign country of a civilian employee of the Army by Military Court-Martial *for a capital offense in time of peace,* or, with the exception of the case of *U.S. ex rel. Mobley v. Handy,* 176 F. 2d 491 (5th Cir.) *cert. denied,* 338 U.S. 904, *rehearing denied,* 338 U.S. 945 (1949),[1]

[1] Mobley was not charged with a capital offense. He was arrested July 31, 1948, charged under Article of War 96 as administered under Manual of Courts-Martial, 1928. Art. 96 was the "catch-all" article and no capital offense could be laid under it. Art. 43 provided that no person could be "sentenced to suffer death" except "for an offense in these articles expressly made punishable by death." Art. 96 provided only punishment "at the discretion of such Court."

for any offense in time of peace. There are, of course, decisions upholding the military trial of civilians serving with the Armed Forces *in the field during time of war.*

Actually, the long-established practice and tradition of British and American law is one of reluctance to give military tribunals authority to try civilians or soldiers for non-military offenses. Mr. Justice Douglas discusses this tradition in *Lee* v. *Madigan*, 79 S.Ct. 276 (Decided January 12, 1959) at Pages 279, 280, as follows:

> "We do not write on a clean slate. The attitude of a free society to the jurisdiction of military tribunals —our reluctance to give them authority to try people for nonmilitary offenses—has a long history.
>
> "We reviewed both British and American history, touching on this point, in *Reid* v. *Covert*, 354 U.S. 1, 23-30, 77 S.Ct. 1222, 1233-1237, 1 L. Ed.2d 1148. We pointed out the great alarms sounded when James II authorized the trial of soldiers for nonmilitary crimes and the American protests that mounted when British courts-martial impinged on the domain of civil courts in this country. The views of Blackstone became deeply imbedded in our thinking: 'The necessity of order and discipline in an army is the only thing which can give it countenance; and therefore it ought not to be permitted in time of peace, when the king's courts are open for all persons to receive justice according to the laws of the land.' 1 Blackstone's Commentaries 413. And see Hale, History and Analysis of the Common Law of England (1st ed. 1713), 40-41. We spoke in that tradition in *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 22, 76 S.Ct. 1, 8, 100 L. Ed. 8, 'Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service.'

"Civil courts were, indeed, thought to be better qualified than military tribunals to try nonmilitary offenses. They have a more deeply engrained judicial attitude, a more thorough indoctrination in the procedural safeguards necessary for a fair trial. Moreover, important constitutional guarantees come into play once the citizen—whether soldier or civilian—is charged with a capital crime such as murder or rape. The most significant of these is the right to trial by jury, one of the most important safeguards against tyranny which our law has designed."

In commenting on the reasons for this tradition, Sir William Blackstone said (1 Blackstone's Commentaries, 412, 413):

"When the nation was engaged in war, more veteran troops and more regular discipline were esteemed to be necessary than could be expected from a mere militia. And therefore at such times more rigorous methods were put in use for the raising of armies, and the due regulation and discipline of the soldiery: which are to be looked upon only as temporary excrescences bred out of the distemper of the state, and not as any part of the permanent and perpetual laws of the kingdom. For martial law, which is built upon no settled principles, but is entirely arbitrary in its decisions, is, as Sir Matthew Hale observes, in truth and reality no law, but something indulged rather than allowed as a law. The necessity of order and discipline in an army is the only thing which can give it countenance; and therefore it ought not to be permitted in time of peace, when the king's courts are open for all persons to receive justice according to the laws of the land. Wherefore, Thomas earl of Lancaster being condemned

at Pontefract, 15 Edw. II., by martial law, his attainder was reversed 1 Edw. III. because it was done in time of peace. And it is laid down, that if a lieutenant, or other, that hath commission of martial authority, doth in time of peace hang or otherwise execute any man by colour of martial law, this is murder; for it is against *magna carta*."

(2) It is true that civilian employees are necessary and sometimes indispensable to the Armed Forces. This is no ground, however, for subjecting them to Military Court-Martial for capital offenses in time of peace.

The argument that this is a proper ground for extending military jurisdiction is premised on the theory that a Court-Martial is more efficient in controlling and punishing crimes, or a greater deterrent to crime than other available methods of trial; or, that in the absence of a Court-Martial, no punishment could be given. The Supreme Court rejected this type of argument in the *Covert* case.

To extend military jurisdiction to civilians because they are necessary to the Armed Forces would be an extremely dangerous doctrine which could cause extensive weakening of the basic Constitutional safeguards of Art. III, and the Fifth and Sixth Amendments.

Mr. Justice Black, speaking to the point of encroachment upon the rights of citizens under the Bill of Rights and quoting from *Boyd* v. *United States*, 116 U.S. 616, 635, 29 L. Ed. 746, 752, 6 S.Ct. 524, said (*Covert*, 354 U.S. 40):

"This can only be obviated by adhering to the rule that Constitutional provisions for the security of person and property should be liberally construed."

And

> "It is the duty of courts to be watchful for the Constitutional rights of the citizen, and against any stealthy encroachments thereon."

During and since World War II, the development of atomic power, radar, electronics, and guided missiles, has resulted in an increasingly large portion of the civilian population becoming necessary to the military. If civilians serving with or employed overseas in peacetime by the military are to be subjected to Court-Martial jurisdiction solely because they are necessary to the Armed Forces, it is but a short step to subject all civilians who are necessary to the Armed Forces to military justice.

Indeed, in recent years constant international tension and increasing threat of massive destruction has become global—as imminent in Washington, D.C., as it is in Orleans, France. Thus, if military jurisdiction over civilian employees is justified because of military necessity in France, there would appear to be no logical reason why such jurisdiction should not be extended to civilian employees serving with or employed by the Armed Forces in the United States.

The Government may argue that, because an overseas commander, unlike the commander in the United States, is charged with the maintenance of discipline over civilian employees who reside on the base, there is a reason for treating civilian employees overseas in a different manner. However, this argument erroneously assumes that there is no alternate forum, and is inapplicable in the case at bar, as petitioner did not live on a military base, but in the City of Orleans (R. 12), where his alleged crime was committed.

(3) It is true that civilian employees associate with the Army through their own volition. It would also appear to be true that civilian dependents accompany the Armed Forces overseas through their own volition. Thus this is not a proper ground for distinguishing the *Grisham* case from the *Covert* case.

Furthermore, this ground implies a waiver of indictment and trial by jury when a civilian voluntarily associates himself with the Armed Forces. Such important Constitutional rights cannot be waived casually or even by implication, however. An express and intelligent consent on the part of the defendant, Government counsel, and the Court is required. Mr. Justice Sutherland in *Patton* v. *United States*, 281 U.S. 276, 312 (1929):

> "Trial by jury is the normal and, with occasional exceptions, the preferable mode of disposing of issues of fact in criminal cases above the grade of petty offenses. In such cases the value and appropriateness of jury trial have been established by long experience, and are not now to be denied. Not only must the right of the accused to a trial by a constitutional jury be jealously preserved, but the maintenance of the jury as a fact-finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, *the consent of the government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant.*" (Emphasis supplied.)

None of these requirements exists in the case at bar.

(4) It is also true that civilian employees have many of the privileges of service men, but civilian dependents also have these same privileges, and this argument was rejected in the *Covert* case.

There are no supportable grounds on which to distinguish among the cases. Grisham, Mrs. Covert, and Mrs. Smith were all civilians. All three were American citizens. All three were charged with murder. All three alleged crimes were committed in a foreign country in time of peace. *The sole, and only difference is that Grisham was a civilian accountant employed by the Army Engineers, and Mrs. Covert and Mrs. Smith were civilian wives of members of the Armed Forces.* If anything, Mrs. Covert and Mrs. Smith had closer connections with the military than Grisham. They were both living on military bases, where their alleged crimes were committed. They were dependent upon the military for food, housing, medical facilities, transportation and protection. In short, their crimes were committed in a closely knit American military community, nearly isolated from the surrounding foreign nation.

Grisham, on the contrary, was living with his wife in a rented apartment in the French city of Orléans (R. 12). He and his wife furnished their own food, medical facilities and transportation (R. 13). They lived in a French community in close contact with French people, and depended on the French authorities for their protection (R. 12).

The Government also argues in this case that Court-Martial jurisdiction is essential in cases of this kind because: (1) Grisham's proximity, physical and social, to the Armed Forces justifies Court-Martial jurisdiction; (2) The adverse effect on military discipline if civilians connected with the Armed Forces are not subject to Court-Martial jurisdiction; (3) The argument that an adverse decision means that only a foreign trial could be had.

All of these arguments are effectively disposed of by Mr. Justice Frankfurter in his opinion in the *Covert* case as follows:

". . . The Government points out that civilian dependents go abroad under military auspices, *live with military personnel in a military community,* enjoy the privileges of military facilities, and that their conduct inevitably tends to influence military discipline. (Emphasis supplied.) (354 U.S. 46; 77 S.Ct. 1246.)

". . . I do not think that the proximity, physical and social of these women to the 'land and naval Forces' is, with due regard to all that has been put before us, so clearly demanded by the effective 'Government and Regulation' of those forces as reasonably to demonstrate a justification for court-martial jurisdiction over capital offenses. (354 U.S. 46, 47; 77 S.Ct. 1246.)

"The Government speaks of the 'great potential impact on military discipline' of these accompanying civilian dependents. This cannot be denied, nor should its implications be minimized. But the notion that discipline over military personnel is to be furthered by subjecting their civilian dependents to the threat of capital punishment imposed by court-martial is too hostile to the reasons that underlie the procedural safeguards of the Bill of Rights for those safeguards to be displaced. It is true that military discipline might be affected seriously if civilian dependents could commit murders and other capital crimes with impunity. No one, however, challenges the availability to Congress of a power to provide for trial and punishment of these dependents for such crimes. (Art. III, Sec. 2, cl. 3.) The method of trial alone is in issue. (354 U.S. 47; 77 S.Ct. 1246.)

"A further argument is made that a decision adverse to the Government would mean that only a foreign

trial could be had. Even assuming that the NATO Status of Forces Agreement, 4 U.S. Treaties and Other International Agreements 1792, T.I.A.S. No. 2846, covering countries where a large part of our armed forces are stationed, gives jurisdiction to the United States only through its military authorities, this Court cannot speculate that any given nation would be unwilling to grant or continue such extra-territorial jurisdiction over civilian dependents in capital cases if they were to be tried by some other manner than Court-Martial. And even if such were the case, these civilian dependents would then merely be in the same position as are so many federal employees and their dependents and other United States citizens who are subject to the laws of foreign nations when residing there." (354 U.S. 48, 49; 77 S.Ct. 1247.)

III

If the Constitutional Rights Guaranteed Petitioner Are Not Absolute, but Are to Be Balanced Against the Power of and Necessity for Congress to Regulate the Military, the Scales Should Be Weighed Heavily in Favor of the Petitioner.

Justices Frankfurter and Harlan in concurring in the result of the *Covert* case indicated that the necessary and proper clause was applicable to Article I, Section 8, clause 14; and that Article III, and the Fifth and Sixth Amendments did not necessarily apply outside of the United States under all circumstances. (*Covert* case, 43, 64, 66.)

This theory would require a balancing of the rights guaranteed to petitioner under the Constitution against the power of and necessity for Congress to regulate the Armed Forces. (*Covert* case, 44, 71-75.) As stated by

Justice Frankfurter, this theory ". . . involves regard for considerations not dissimilar to those involved in a determination under the Due Process Clause." (*Covert* case, 44.)

Under this theory, it is submitted that the ". . . scales should be tipped heavily in favor of the Bill of Rights when weighed against the immediate convenience and utility of court-martial jurisdiction over civilians employed by the military in peacetime. 'Perhaps (the founding fathers) were aware that memories fade and hoped they (by the Bill of Rights) could keep the people of this nation from having to fight again and again the same old battle for individual freedoms'" (Note, Tulane Law Review, Vol. XXXIII, page 686, quoting *Covert* case, 29-30). This is particularly true in the case of Grisham, because he was tried for a capital offense where the issue was life or death.

> "These cases involve the validity of procedural conditions for determining the commission of a crime in fact punishable by death. The taking of life is irrevocable. It is in capital cases especially that the balance of conflicting interests must be weighed most heavily in favor of the procedural safeguards of the Bill of Rights. Thus, in Powell v. State of Alabama, 287 U.S. 45, 71, 53 S.Ct. 55, 65, 77 L. Ed. 158, the fact 'above all that they stood in deadly peril of their lives' led the Court to conclude that the defendants had been denied due process by the failure to allow them reasonable time to seek counsel and the failure to appoint counsel." (77 S.Ct. 1245, 1246; 354 U.S. 45, 46.) (Opinion of Mr. Justice Frankfurter.)
>
> "So far as capital cases are concerned, I think they stand on quite a different footing than other offenses. In such cases the law is especially sensitive to demands for that procedural fairness which inheres in a civilian

> trial where the judge and trier of fact are not responsive to the command of the convening authority. I do not concede that whatever process is 'due' an offender faced with a fine or a prison sentence necessarily satisfies the requirements of the Constitution in a capital case. The distinction is by no means novel, compare Powell v. State of Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L. Ed. 158, with Betts v. Brady, 316 U.S. 455, 62 S.Ct. 1252, 86 L. Ed. 1595; nor is it negligible, being literally that between life and death." (77 S.Ct. 1262; 354 U.S. 77.) (Opinion of Mr. Justice Harlan.)

The only fact that the respondent can point to as giving some weight on the side of the scales represented by the convenience and utility of Court-Martial jurisdiction is that Grisham was a civilian accountant working for the Army as opposed to civilian dependents in the *Covert* case. There are no facts in the record to indicate that the work Grisham was performing was essential or indispensable to any military function of the Headquarters Army Europe Communications Zone. In fact, the normal work of an accountant would appear to be fairly remote from essential or indispensable military functions. Certainly the mere fact that Petitioner was employed as an accountant should not be sufficient to warrant overriding of the requirements guaranteed by the Constitution in a capital case.

IV

Alternate Methods of Trial Available

In the briefs and oral argument in the courts below, the respondent contended that Article 2 (II) should be upheld because, *inter alia*, no satisfactory alternate forum was available where petitioner could have an Article III trial.

The French courts had primary jurisdiction in this case, and from the outset the petitioner has challenged the jurisdiction of the military and insisted upon trial by the French (R. 16, 17); of course, this would not have been an Article III trial.

Congress, however, has the power under Art. III, Sec. 2, cl. 3, to provide for the trial of crimes not committed within any state, and has provided for such trial in the district where the offender is first apprehended or first brought (18 U.S.C. 3238). In fact, the Government has frequently used this Statute to try persons charged with treason in United States District Courts.

Thus, two alternate forums were available, and Congress has the power to create a system of courts—either separate from, or within the military system—to deal with cases of this nature, and to provide the protection required by the Constitution and the Bill of Rights. (See Note, Harvard Law Review, Vol. 71, 712-727.)

Thus, to paraphrase Mr. Justice Frankfurter:

> No one challenges the availability to Congress of power to provide for trial and punishment in these cases. "The method of trial alone is in issue." (*Covert* case, 47.)

V

CONCLUSION

At issue in this case are fundamental principles of our Constitution and our form of Government. Its importance transcends this petitioner and this case. This was pointed out by Mr. Justice Davis in the case of *Ex parte Milligan*, 4 Wallace 2, 71 U.S. 2 (1866):

> "No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people; for it is the birthright of every American citizen when charged with crime, to be tried and punished according to law . . .
>
> * * * * * * *
>
> "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence; . . .
>
> * * * * * * *
>
> "Martial law . . . destroys every guarantee of the Constitution, and effectually renders the 'military independent of, and superior to, the civil power,'—the attempt to do which by the King of Great Britain was

deemed by our fathers such an offense, that they assigned it to the world as one of the causes which impelled them to declare their independence . . ."

It is respectfully submitted that the Constitution does not permit the trial in a foreign country of a civilian employee of the Army by military Court-Martial for a capital offense in time of peace.

Respectfully submitted,

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